

ESTTA Tracking number: **ESTTA675627**Filing date: **06/02/2015**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**Petition for Cancellation**

Notice is hereby given that the following party requests to cancel indicated registration.

**Petitioner Information**

Name	Boston Iced Tea Company, Inc.		
Entity	Corporation	Citizenship	Delaware
Address	924-A Chapala Avenue Santa Barbara, CA 93101 UNITED STATES		

Attorney information	Roger N. Behle, Jr. Foley Bezek Behle & Curtis, LLP 575 Anton Blvd., #710 Costa Mesa, CA 92626 UNITED STATES rbehle@foleybezek.com, ehuffman@foleybezek.com, revans@foleybezek.com Phone:7145561700
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**Registration Subject to Cancellation**

Registration No	4703971	Registration date	03/17/2015
Registrant	BBK Pictures, Inc. 404 North 19th Street Philadelphia, PA 19130 UNITED STATES		

**Goods/Services Subject to Cancellation**

Class 030. First Use: 2014/03/14 First Use In Commerce: 2014/03/14 All goods and services in the class are cancelled, namely: Tea-based beverages with fruit flavoring; tea; Tea-based beverages
Class 032. First Use: 2014/03/14 First Use In Commerce: 2014/03/14 All goods and services in the class are cancelled, namely: Concentrated fruit juice; Concentrates for making fruit juices; Fruit drinks and fruit juices; Fruit drinks and juices; Fruit juices; Fruit juice bases; Fruit juice concentrates; Herbal juices; Mixedfruit juice; Non-alcoholic beverages containing fruit juices; Non-alcoholic fruit juice beverages; Non-alcoholic beverages with tea flavor

**Grounds for Cancellation**

<i>Torres v. Cantine Torresella S.r.l.Fraud</i>	808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)
The mark is primarily geographically deceptively misdescriptive	Trademark Act section 2(e)(3)
Other	Registrant is not the owner of the mark - 15 U.S.C. Â§ 1051(b); Am. Forests v. Sanders, 54 USPQ2d 1860, 1864 (TTAB 1999),Â aff#d,Â 232 F.3d 907 (Fed. Cir. 2000); Trademark Manual of Examining Procedure (#TMEP#) Â§1201.

Related Proceedings	TTAB Opposition No. 91214191
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Attachments	Boston Iced Tea Petition to Cancel FINAL 060215.pdf(111106 bytes )
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### Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/roger n. behle, jr./
Name	Roger N. Behle, Jr.
Date	06/02/2015

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

**In the matter of:** Trademark Registration No. 4703971, on the Principal Register  
**Mark:** Boston Tea  
**Date Filed:** March 18, 2015

<p>BOSTON ICED TEA COMPANY, INC.,</p> <p style="text-align: center;">Petitioner,</p> <p style="text-align: center;">vs.</p> <p>BBK PICTURES, INC.,</p> <p style="text-align: center;">Registrant.</p>	<p>Cancellation No. _____</p>
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**PETITION TO CANCEL**

Petitioner, Boston Iced Tea Company, Inc., is a Delaware corporation located and doing business at 924-A Chapala Avenue, Santa Barbara, California 93101.

To the best of Petitioner's knowledge, the name of the registrant is BBK Pictures, Inc., a Pennsylvania corporation located and doing business at 404 North 19th Street, Philadelphia, Pennsylvania 19130.

The above-identified petitioner believes that it has been and/or will be damaged by the continuing registration of the mark BOSTON TEA ("Mark") on the Principal Register, and hereby petitions to cancel the same.

**BASIS FOR CANCELLATION**

**STATEMENT OF FACTS**

1. BBK Pictures, Inc. ("Registrant") was not the owner of the Mark as of the application filing date, February 8, 2011. 15 U.S.C. § 1051(b). Further, Registrant was not the

entity with a bona fide intention to use the Mark in commerce at the time the application was filed, and thus, the application is void. *Am. Forests v. Sanders*, 54 USPQ2d 1860, 1864 (TTAB 1999), *aff'd*, 232 F.3d 907 (Fed. Cir. 2000). Trademark Manual of Examining Procedure (“TMEP”) §1201.

2. Registrant filed the above-identified trademark application with the United States Patent and Trademark Office (“USPTO”) on February 8, 2011 to register the Mark with intent to use in connection with “*tea-based beverages with fruit flavoring; tea; tea-based beverages*” in International Class 030, and “*concentrated fruit juice; concentrates for making fruit juices; fruit drinks and fruit juices; fruit drinks and juices; fruit juices; fruit juice bases; fruit juice concentrates; herbal juices; mixed fruit juice; non-alcoholic beverages containing fruit juices; non-alcoholic fruit juice beverages; non-alcoholic beverages with tea flavor*” in International Class 032. The application lists Registrant (“BBK Pictures, Inc.”) as the owner of the Mark.

3. Registrant claims first use of the Mark in commerce occurred on March 14, 2014. Registrant filed its Statement of Use on March 24, 2014, claiming use in commerce of *all* goods listed in the application, and the Mark proceeded to registration on March 17, 2015.

4. Petitioner filed a trademark application for the mark “MAGUIRE’S BOSTON ICED TEA” with the USPTO on March 22, 2013 to register said mark with intent to use in connection with “*beverages made of tea; beverages with a tea base; iced tea; tea; tea-based beverages*,” all in International Class 030. The examining attorney at the USPTO determined this mark to be entitled to registration, and published the mark for opposition on August 27, 2013.

#### **PETITIONERS STANDING TO FILE**

5. Petitioner operates a business under the name “Boston Iced Tea Company, Inc.” and has expended time and resources in developing its business. On March 22, 2013, Petitioner filed an intent-to-use application with the USPTO to register its trademark, MAGUIRE’S BOSTON ICED TEA (Ser. No. 85/884091). The application was reviewed and approved for publication by the USPTO on August 27, 2013. Registrant has since opposed Petitioner’s registration of the MAGUIRE’S BOSTON ICED TEA MARK. Petitioner would be harmed if Registrant is permitted to maintain registration of the Mark on the Principal Register.

6. A petition to cancel a mark registered may be brought to cancel a mark where the registrant is not (and was not, at the time of the filing of its application for registration) the rightful owner of the registered mark. TBMP § 309.03(c); *Ballet Tech Foundation, Inc. v. The*

*Joyce Theater Foundation, Inc.*, 89 USPQ2d 1262 (TTAB 2008). And, a trademark application brought in the name of the wrong party cannot be amended. See TMEP § 1201.02(b) (“When an application is filed in the name of the wrong party, this defect cannot be cured by amendment or assignment”); 37 C.F.R. 2.71(d) (“However, the application cannot be amended to set forth a different entity as the Registrant. An application filed in the name of an entity that did not own the mark as of the filing date of the application is void.”)

## **GROUND ALLEGED FOR CANCELLATION**

### Registrant is Not the Owner of the Mark

7. By Registrant’s own admission in sworn deposition testimony, Registrant is not the rightful owner of the Mark. Registrant admits that it has never sold any of the products listed in its application, despite having represented to the USPTO in its Statement of Use that *all* such products had been sold under the Mark. Further, to the extent products are being sold (which Petitioner disputes), they are being sold by an entirely different entity, 1300 North 9<sup>th</sup> Street LLC. Registrant has further admitted in its sworn deposition testimony that it has not entered into any written agreements with that other entity, including license agreements. Further, the nature and quality of the goods allegedly being sold are, if Registrant’s representations are accepted as true, actually being controlled by a completely different entity. Registrant has no authority or means of controlling any such goods allegedly being sold under its claimed Mark. Among other reasons, Registrant’s application was and is void because it was not filed by the person or entity that purportedly owns the Mark and sells the subject products.

8. An application for a federal trademark registration must be made by the “owner” of the trademark; corporations are not “related companies” within the meaning of §5 of the Trademark Act, 15 U.S.C. §1055, merely because they have the same stockholders, directors, or officers, or because they occupy the same premises. *Great Seats, Ltd. v. Great Seats, Inc.*, 84 USPQ2d 1235, 1243 (TTAB 2007).

9. For the foregoing reasons, the registration issued to Registrant should be cancelled as Registrant is not the rightful owner of the Mark. Petitioner would be damaged by the registration.

### Fraud

10. Registrant knowingly made false, material representations of facts in connection with its Application by representing to the USPTO that it has used the mark in commerce on all

goods and services in the Statement of Use filed March 13, 2014, when in fact it has not sold any of the goods listed in its application.

11. Registrant made the representation with the intention that the USPTO would rely on this representation in registering the Mark on the Principal Register.

12. If fraud can be shown in the procurement of a registration, the entire resulting registration is void. *General Car and Truck Leasing Systems, Inc. v. General Rent-A-Car Inc.*, 17 USPQ2d 1398, 1401 (S.D. Fla. 1990), *aff'g General Rent-A-Car Inc. v. General Leaseways, Inc.*, Canc. No. 14,870 (TTAB May 2, 1998); cited in *Medinol Ltd v. Neuro Vasx Inc.*, 67 USPQ2d 1205 (TTAB 2003).

The Mark is Primarily Geographically Deceptively Misdescriptive

14. Based on Registrant's own sworn testimony, Registrant's products and ingredients do not originate from nor are they affiliated with the City of Boston, Massachusetts. The products are not even sold in the Boston area, but rather (and to the extent there are even any sales) are alleged to be sold in New Jersey and Philadelphia.

WHEREFORE, Petitioner believes that it will be damaged if the Mark is allowed to remain registered on the Principal Register and Petitioner prays that Trademark Registration No. 4703971 be canceled immediately, and that this Petition to Cancel be sustained in favor of Petitioners, pursuant to Federal Rules of Civil Procedure and the Rules of the USPTO and the TTAB.

Dated: June 2, 2015

FOLEY BEZEK BEHLE & CURTIS, LLP

/Roger N. Behle, Jr./

Roger N. Behle, Jr.

Attorney for Petitioner BOSTON ICED TEA  
COMPANY, INC.

CERTIFICATE OF SERVICE

It is hereby certified that on the 2nd day of June, 2015, the foregoing PETITION TO CANCEL was served on Registrant by sending a copy thereof to:

BBK PICTURES, INC.  
c/o Dina Leytes  
GRIESING LAW, LLC  
1717 Arch Street Suite 3630  
Philadelphia, PA 19103  
UNITED STATES  
Phone: 215-732-3924  
[dleytes@griesinglaw.com](mailto:dleytes@griesinglaw.com)

Registrant, by first-class, postage-prepaid mail. Electronic copies were also served via email.

Dated: June 2, 2015

FOLEY BEZEK BEHLE & CURTIS, LLP

/Roger N. Behle, Jr./  
Roger N. Behle, Jr.  
Attorney for Petitioner  
Boston Iced Tea Company, Inc.